

FILED

JUL 27 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD LYNN SWIHART,

Defendant - Appellant.

No. 05-30469

D.C. No. CR-04-02159-AAM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Richard Lynn Swihart appeals from the district court's denial of his motion for continuance and its refusal to consider his untimely motion to suppress. We review for abuse of discretion. *See United States v. Zamora-Hernandez*, 222 F.3d

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1046, 1049 (9th Cir. 2000). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Upon review, we conclude that the district court did not abuse its discretion by denying Swihart's motion for continuance because the case had already been continued twice, Swihart had previously been granted a continuance, and Swihart has failed to show that he suffered prejudice as a result of the denial. *See Zamora-Hernandez*, 222 F.3d at 1049 (noting the factors to weigh when reviewing a denial of a continuance, and stating that the appellant, at a minimum, must show that he has suffered prejudice as a result of the denial of his request). Further, the district court did not abuse its discretion by refusing to consider Swihart's motion to suppress because the motion was untimely and Swihart offered no justification for the untimeliness. *See United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir. 1990) (stating that an unjustified failure to make a timely motion to suppress pursuant to Fed. R. Crim. P. Rule 12 constitutes a waiver of that right).

AFFIRMED.